AUG 2
JOHN T. FE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 353

SMITH-JOHNSON STEAMSHIP CORP., *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

ARTHUR M. BECKER,
839 17th Street, N. W.,
Washington 6, D. C.,
Counsel for Petitioner.

Of Counsel:

BECKER & MAGUIRE,
Washington, D. C.

August 28, 1956.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

CONTENTS

	Page
Petition for Writ of Certiorari to the Court of Claims	1
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	7
Conclusion	22
Appendix A: Statutes Involved	1a
Appendix B: Order and Opinion Below	4a
Appendix C: Order and Opinion of Court Below Dated March 6, 1956	7a

CITATIONS

CASES:

Alaska Steamship Co. v. *United States*, 290 U.S. 256 ..... 17, 19

Allanwilde Transport Corp. v. *Vacuum Oil Co.*, 248 U.S. 377 20

American Eastern Corp. v. *United States*, 133 F. Supp. 11 (S.D.N.Y. 1955), *aff'd* 231 F. 2d 664 (2d Cir. 1956) 22

D. C. Andrews & Co. v. *United States*, 129 C. Cls. 574 (1954) 18, 19

Archawski v. *Hanioti*, 350 U.S. 532 ..... 8, 9, 22

A. H. Bull Steamship Co. v. *United States*, 141 F. Supp. 58 (S.D.N.Y. 1956) 22

Calmar Steamship Corp. v. *United States*, 345 U.S. 446 ..... 10, 14, 20

Carriso, Inc. v. *United States*, 106 F. 2d 707 (9th Cir. 1939) 18, 19

Page

Christie-Street Commission Co. v. *United States*, 136 Fed. 326 (8th Cir. 1905) 13, 19
Clapp v. *United States*, 127 C. Cls. 505 (1954), *cert. denied*, 348 U.S. 834 ..... 18, 19
Commercial Trust Co. v. *United States Shipping Bd. E. F. Corp.*, 48 F. 2d 113 (2d Cir. 1931) 19
Compania Ithaca de Vapores, S. A. v. *United States*, 129 C. Cls. 745 (1954) 18, 19
Davis v. *Department of Labor*, 317 U.S. 249 20
Dooley v. *United States*, 182 U.S. 222 ..... 10, 13, 16, 19, 21
Globe & Rutgers Ins. Co. v. *United States*, 105 F. 2d 160 (2d Cir. 1939), *cert. denied*, 308 U.S. 611 20
The Harriman, 9 Wall. 161 20
Home Ins. Co. v. *Merchants' Transp. Co.*, 16 F. 2d 372 (9th Cir. 1926) 19
The Hope, 10 Pet. 108 20
Isbrandtsen Co. v. *United States*, 233 F. 2d 184 (2d Cir. 1956) 9
Israel v. *Moore & McCormac Co.*, 295 Fed. 919 (S.D. N.Y. 1920) 19
Johnson v. *Fleet Corp.*, 280 U.S. 320 ..... 7, 8, 9, 10, 15
Keifer & Keifer v. *Reconstruction Finance Corp.*, 306 U.S. 381 ..... 13, 14
Matson Navigation Co. v. *United States*, 284 U.S. 352 20
The Missouri, 17 Fed. Cas. 479, No. 9,652 (D.C.E.D. N.Y. 1869) 17
National City Bank v. *Republic of China*, 348 U.S. 356 14
Pan American World Airways, Inc. v. *United States*, 129 C. Cls. 53 (1954) 19
Prince Line, Ltd. v. *American Paper Exports, Inc.*, 55 F. 2d 1053 (2d Cir. 1932) 19
Prudential Steamship Corp. v. *United States*, 220 F. 2d 655 (2d Cir. 1955) 12

Page

Reliance Lumber Co. v. *Rothschild*, 127 Fed. 745 (E.D. Pa. 1904) 20

Richfield Oil Corp. v. *United States*, 207 F. 2d 864 (9th Cir. 1953) 18, 19

Silva v. *Bankers Commercial Corp.*, 163 F. 2d 602 (2d Cir. 1947) 19

Smith-Johnson Steamship Corp. v. *United States*, 139 F. Supp. 298 (C. Cls. 1956), *cert. denied*, 351 U.S. 988 .....2, 5, 6, 7

Text of Opinion 7a

Southeastern Oil Florida, Inc. v. *United States*, 127 C. Cls. 409 (1953), *cert. denied*, 348 U.S. 834 ..18, 19, 21

States Marine Corp. v. *United States*, 120 F. Supp. 585 (S.D.N.Y. 1954), *rev'd on other grounds*, 220 F. 2d 655 (2d Cir. 1954) 9

Sword Line, Inc. v. *United States*, 228 F. 2d 344 (2d Cir. 1955) *aff'd on rehearing*, 230 F. 2d 75 *aff'd*, 351 U.S. 976 .....3, 5, 6, 7, 8, 14, 15, 17, 18

Taylor v. *Carryl*, 20 How. 583 13

United States v. *Atlantic Mutual Insurance Co.*, 298 U.S. 483 .....7, 10, 11, 12, 14, 17, 19

United States v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 .....10, 19, 21, 22

United States v. *Hvoslef*, 237 U.S. 1 .....16, 19

United States v. *La Vengeance*, 3 Dall. 297 ....15, 17, 20

United States v. *New York and Cuba Mail Steamship Co.*, 200 U.S. 488 .....16, 19

United Transp. & L. Co. v. *N. Y. & Baltimore T. Line*, 185 Fed. 386 (2d Cir. 1911) 19

STATUTES:

Merchant Marine Act, 1936, 49 Stat. 2010, 46 U.S.C. § 1199(a) 2, 3

Text of Section 709(a) 3a

Merchant Ship Sales Act of 1946, 60 Stat. 43, 61 Stat. 190, 50 U.S.C. App. § 1738 .....2, 3, 4

Text of Section 5 ..... 2a

Page

Public Vessels Act (Act of March 3, 1925), 43 Stat. 1112, 46 U.S.C. § 781 12

Suits in Admiralty Act (Act of March 9, 1920), 41 Stat. 525, 46 U.S.C. §§ 741, 742 .....2, 4, 5, 7, 8, 12, 13, 14, 15, 18, 20

Text of Sections 1 and 2 ..... 1a

28 U.S.C. § 1255(1) 2

28 U.S.C. § 1333 9

28 U.S.C. § 1491 (Tucker Act) 2, 4, 7, 8, 10, 11, 12, 13, 14, 16, 17, 18, 20, 21

Text 1a

28 U.S.C. § 1500 20

OTHER AUTHORITIES:

Annual Report of the Director of the Administrative Office of the United States Courts (1955) 20

Churchill, A History of the English Speaking Peoples, Vol. I (Dodd, Mead & Co., 1956) 9

3 Story Com. Const. (1833) (5th ed., 1891) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

SMITH-JOHNSON STEAMSHIP CORP., *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Smith-Johnson Steamship Corp. prays that a writ of certiorari issue to review the final judgment and order of the United States Court of Claims, entered in the above case on July 12, 1956.

OPINIONS BELOW

The opinion of the Court of Claims in which it included its judgment and order of July 12, 1956 (R. 547), is not yet reported and is printed in Appendix B hereto, pages 4a-6a *infra*. The Court of Claims had previously written an opinion on the same question in

this case on March 6, 1956.[1] That opinion (R. 127) is reported at 139 F. Supp. 298, and is printed in Appendix C hereto, pages 7a-13a, *infra*.

JURISDICTION

The date of the judgment and order of the Court of Claims sought to be reviewed is July 12, 1956 (R. 547). Appendix B, pages 4a-6a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTION PRESENTED

The question presented is:

Does the Court of Claims have jurisdiction over a suit against the United States based upon Section 5 of the Merchant Ship Sales Act of 1946 and Section 709 (a) of the Merchant Marine Act, 1936, under 28 U.S.C. § 1491, which provides: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any Act of Congress . . . ," in a case where suit might have been brought upon the same claim in the District Court under the Act of March 9, 1920, known as the Suits in Admiralty Act.

THE STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. § 1491 (originally the Tucker Act); Sections 1 and 2 of the Act of March 9, 1920 (known as the Suits in Admiralty Act), 41 Stat. 525, 46 U.S.C. §§ 741, 742; Section 5 of the Merchant Ship Sales Act of 1946, 60 Stat. 43, 61 Stat. 191, 50 U.S.C. App. § 1738; and Sec-

---

[1] The decision sought to be reviewed overruled and reversed the decision and order included in the March 6th opinion.

tion 709(a) of the Merchant Marine Act, 1936, 49 Stat. 2010, 46 U.S.C. § 1199(a). They are printed in Appendix A, pages 1a-4a, *infra*.

STATEMENT

The claim in this case is similar to the claim in *Sword Line, Inc.* v. *United States,* 351 U.S. 976. Petitioner is one of 46 steamship companies which sued in the court below for the return of excessive preliminary payments of additional charter hire for the use of Government vessels allegedly unlawfully exacted by Government officials and retained by the Government in violation of Section 5 of the Merchant Ship Sales Act of 1946.

The charter agreement which petitioner was required to sign as a condition precedent to receiving an allocation of vessels under charter provided for the collection and retention of the payments in question. Both parties agreed in the court below that the sole issue in the case was whether the Ship Sales Act, the Act of Congress under which the Government officials purported to act, authorized the exaction of such payments.[2] Respondent pointed out in its memorandum

---

[2] On pp. 19 and 20 of its Memorandum in support of its Motion to Strike Defendant's Special Defense of Want of Jurisdiction of Subject Matter, filed August 12, 1955 (R. 35-36), petitioner advised the court below:

> "There is only one issue in this case: Did the Merchant Ship Sales Act of 1946—the statute under which defendant's officials purported to act—authorize them to exact the payments in question? What the charter agreement provided is immaterial."

On p. 37 of Defendant's Objections to Plaintiff's Motion to Strike Defendant's Special Defense of Lack of Jurisdiction of the

in support of its motion of June 12 to dismiss this case and two others for lack of jurisdiction:

> "The actions are therefore indisputably founded on the indicated Acts of Congress." (R. 539.)

Respondent in its answer admitted all the material allegations of the complaint but asserted a special defense of lack of jurisdiction of the subject matter (R. 9). It alleged that petitioner's claim was maritime and therefore within the exclusive jurisdiction of the district court under the Suits in Admiralty Act. Upon petitioner's motion the court by order dated March 6, 1956 struck this special defense and sustained its jurisdiction under the Tucker Act because, as stated in its opinion (R. 130):

> "If plaintiff were basing its claim on the charter agreement, the action would clearly be maritime in nature and maintainable in admiralty; but plaintiff does not base its claim on the charter agreement, but on the ground that the agreement exacted more than could lawfully be exacted. The contract has been performed according to its terms. No cause of action on the contract exists. Plaintiff's claim can only be grounded on the fact that the contract required more than the law author-

---

Subject Matter, filed in the court below on October 21, 1955 (R. 87), respondent agreed, and advised the court below:

> "It is common ground to plaintiff and defendant that on the question of jurisdiction, which is all that is now before the Court, there is (in plaintiff's words) only one issue made by the pleadings in the case: 'Did the Merchant Ship Sales Act of 1946—the statute under which defendant's officials purported to act—authorize them to exact the payments in question? What the charter agreement provided is immaterial.' "

ized. Hence, its action is based on the statute, and this court, therefore, has jurisdiction."[3] 139 F. Supp. at 300, Appendix, p. 11a, *infra*.

Respondent's motion for reargument and clarification of the March 6th order was denied on May 28, 1956 (R. 527).

While petitioner's motion to strike the special defense of lack of jurisdiction was pending in the court below, the Court of Appeals for the Second Circuit held in *Sword Line, Inc.* v. *United States,* 228 F. 2d 344, *aff'd on rehearing,* 230 F. 2d 75, that the district court had jurisdiction under the Suits in Admiralty Act over a claim similar to this one but dismissed the libel "for lack of jurisdiction" because it was filed too late.

On April 14, 1956, libelant in *Sword Line* filed its petition for a writ of certiorari to review the dismissal of its libel for lack of jurisdiction. Libelant did not object to the dismissal "for lack of jurisdiction" under the Suits in Admiralty Act but urged that the district court lacked jurisdiction because the claim was not maritime and not, as the Court of Appeals had held, because it was filed too late. On April 18, the Solicitor General filed a memorandum in this Court urging the granting of the writ because of an asserted conflict with the March 6 decision of the court below in this case.

---

[3] The court also said, in disagreement with the opinion of the Court of Appeals for the Second Circuit in *Sword Line, Inc.* v. *United States,* 228 F. 2d 344, that the cause of action could not have been maintained in admiralty, and indicated, mistakenly, in our view, that it would have lacked jurisdiction had the plaintiff been entitled to proceed in admiralty. 139 F. Supp. at 300-301, Appendix, pp. 11a-12a, *infra*.

Because of the theoretical nature of the jurisdictional disagreement in *Sword Line*, the unusual manner in which the question arose,[4] and the effect that a decision by this Court in that case was likely to have on this case, petitioner herein on April 24 petitioned for a writ of certiorari to review the March 6 decision of the court below in its favor. The Government opposed the granting of the writ principally on the ground that petitioner had been successful in the court below and also because:

> "On June 5, 1956, petitioner's motion for summary judgment on the substantive issues of the case was argued and submitted in the court below. This, we submit, disposes of the basis of the instant petition for a writ of certiorari before final judgment, *viz*, the desirability of settling the issue of jurisdiction prior to the trial on the merits."[5]

---

[4] Petitioner in *Sword Line* had invoked the jurisdiction of the district court. He challenged such jurisdiction for the first time on rehearing in the Court of Appeals. As Chief Judge Clark explained:

> "At that time [the original argument] libelant had expressly accepted admiralty jurisdiction, leading to the government's somewhat perfunctory notation of jurisdiction, with a formal citation or two; but nevertheless we raised the question at the argument and necessarily considered it with some care, as was our duty. Though our conclusion accorded with that then held by counsel, it obviously suggested to libelant a point it had overlooked; for now the real issue on this rehearing has centered upon libelant's claim vigorously pressed that admiralty lacked jurisdiction and that we had overlooked relevant authorities in holding otherwise." 230 F. 2d at 75.

[5] Supplemental Memorandum for the United States, *Smith-Johnson Steamship Corp.* v. *United States*, No. 898, October Term, 1955, p. 1.

On June 11, this Court denied certiorari to review the March 6 decision of the court below (351 U.S. 988) and granted certiorari and affirmed *per curiam* without argument the decision of the Court of Appeals in *Sword Line Inc.* v. *United States,* 351 U.S. 976.

On June 28, respondent moved that the court below reconsider its decision of March 6 and dismiss this case for lack of jurisdiction because

> "the Supreme Court held in the *Sword Line* case that the Suits in Admiralty Act granted the district courts exclusive jurisdiction of claims to recover back amounts collected as charter hire at a rate alleged to be in excess of that provided by the applicable Acts of Congress." (R. 538.)

This motion was granted on July 12 and the petition in the court below was dismissed for lack of jurisdiction. (R. 547, Appendix, p. 6a.) Certiorari is sought to review this decision of the court below.

REASONS FOR GRANTING THE WRIT

The decision of the court below is sufficiently important to be reviewed by this Court because, as a result of misconstruing the decision of this Court in *Sword Line, Inc.* v. *United States,* 351 U.S. 976, and in *Johnson* v. *Fleet Corp.,* 280 U.S. 320, and overlooking the decision of this Court in *United States* v. *Atlantic Mutual Insurance Co.,* 298 U.S. 483, the decision denies the trend of Congressional policy concerning Governmental immunity which has been recognized by this Court, and will lead to profitless litigation in a large number of cases arising out of maritime transactions where the Court of Claims and the district courts have, with the approval of this Court, exercised jurisdiction under the Tucker Act for over half a century.

1. The court below held that it lacked jurisdiction in this case although the claim is founded upon an Act of Congress, because this Court in *Sword Line* decided that a libel might be filed on a similar claim under the Suits in Admiralty Act. It interpreted this Court's decision in *Johnson* as prohibiting it from exercising jurisdiction in such a case.

The decision of the court below actually conflicts with *Sword Line* and misinterprets *Johnson*. In *Sword Line*, the questions as to jurisdiction presented to this Court in the petition for certiorari were:

> "1. Can a court of admiralty have jurisdiction over a claim for money unconscionably retained in violation of the provisions of an Act of Congress, although not in violation of a maritime contract.
>
> "2. Does admiralty have jurisdiction over a suit in quasi contract for money had and received when there is an express maritime contract, but no breach thereof."[6]

This Court did not decide that the Court of Claims lacked jurisdiction under the Tucker Act. It decided that the district court had jurisdiction under the Suits in Admiralty Act.

In sustaining the jurisdiction of the district court under the Suits in Admiralty Act on authority of *Archawski* v. *Hanioti*, 350 U.S. 532, this Court refused to restrict libelant's right to sue the Government because of jurisdictional theories based upon the historical development of procedural devices. In *Sword Line* this Court sanctioned a choice of procedural remedies

---

[6] Petition for Writ of Certiorari, *Sword Line, Inc.* v. *United States*, No. 861, October Term, 1955, pp. 2-3.

in a suit against the Government similar to that which it had recognized in the *Archawski* case in suits between private parties.[7] It did not, as the court below assumed, limit the injured party's right to sue the Government to a particular procedural device which it recognized was available in admiralty. This Court refused to subordinate the high moral purpose of Congress to irrelevant procedural factors; the court below gave such factors controlling weight.[8]

The interpretation by the court below of the *Johnson* opinion, while it has support in lower court decisions (see *States Marine Corp.* v. *United States*, 120 F. Supp. 585 (S.D.N.Y. 1954), *rev'd on other grounds*, 220 F. 2d 655 (2d Cir. 1954); see also *Isbrandtsen Co.* v. *United States*, 233 F. 2d 184 (2d Cir. 1956)), overlooks material differences between the facts in this case and the facts in the four cases considered in the *Johnson* opin-

---

[7] In *Archawski* the libelant unquestionably could have availed himself of his common law remedy for fraud and deceit, as well as the remedy in admiralty which this Court recognized. 28 U.S.C. § 1333.

[8] "It was not until de Montfort's revolt against the third Henry in the thirteenth century that the multiplication of writs was checked, and the number fixed at something under two hundred. This system then endured for six hundred years. However the times might change, society had to adapt itself to that unbending framework. Inevitably English law became weighted with archaisms and legal fictions. The whole course of a case might depend on the writ with which it was begun, for every writ had its special procedure, mode of trial, and eventual remedy. Thus the Saxon spirit of formalism survived. Henry II had only been able to break down the primitive methods of the early courts by fastening upon the law a procedure which became no less rigid." CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES, Vol. I, p. 221 (Dodd, Mead & Co., 1956).

ion, and is inconsistent with the decision of this Court in *United States* v. *Atlantic Mutual Insurance Co.*, 298 U.S. 483.

Each of the four cases considered in the *Johnson* opinion (suits for injuries to seamen on navigable waters, for damage to cargo, and for failure to deliver cargo) depended entirely upon the principles of maritime law. There were therefore strong reasons of policy why they should be decided by judges experienced in admiralty. (Cf. *Calmar Steamship Corp.* v. *United States*, 345 U.S. 446, 455.) The present case does not depend upon principles of maritime law. The claim is for the return of an illegal exaction by Government officials. The law with respect to such claims was developed largely in the Court of Claims under the jurisdiction granted to it in the Tucker Act to determine claims against the Government founded upon a law of Congress. The court applied to suits against the Government for the return of illegal exactions the principles by which similar suits had been pursued at common law against Government officials. (See *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28; *Dooley* v. *United States*, 182 U.S. 222.)

The refusal of the court below to recognize in this case the jurisdiction plainly conferred by the terms of the Tucker Act is inconsistent with the decision of this Court in *United States* v. *Atlantic Mutual Insurance Co., supra.* In the *Atlantic Mutual Insurance Co.* case this Court sustained the jurisdiction of the Court of Claims under the Tucker Act over a suit for general average contribution based upon the jettisoning of cargo on an Army transport. This Court recognized that the application of various jurisdictional theories

gave the injured party a choice of procedural remedies. The Court explained:

> "The law of general average is an ancient feature of the maritime law and proceeds on the equitable principle that that which is sacrificed by one for the benefit of all in the course of a common venture at sea should be made good by the contribution of all.
>
> "Various means of enforcing such contribution have become well recognized, such as a suit in rem in admiralty against ship or cargo, a suit in personam in admiralty against shipowner or cargo owner, and an action at law or a suit in equity against ship owner or cargo owner." 298 U.S. at 489.

It held that the United States was suable on the claim in the Court of Claims because the language of the Tucker Act invested that court with jurisdiction. The Court said:

> "The United States is not suable without its assent, and therefore a suit in personam against it as the owner of the vessel needed the support of a permissive statute. But there is such a statute, which has been long in force. It in direct terms invests the Court of Claims with jurisdiction to hear and determine all claims against the United States founded—
>
> 'upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or ad-

miralty if the United States were suable.'" 298 U.S. at 490.[9]

Section 1491 of 28 U.S.C. in equally direct terms invests the Court of Claims with "jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress...." Respondent agrees that the claim in this case is "indisputably founded on the indicated Acts of Congress." (R. 539.)

The claim here, therefore, is as much a claim founded upon an Act of Congress within the jurisdiction of the Court of Claims under the Tucker Act as it is a claim for unjust enrichment under a maritime contract within the jurisdiction of the district court under the Suits in Admiralty Act.[10] There is

---

[9] The Court of Appeals for the Second Circuit in *Prudential Steamship Corp.* v. *United States*, 220 F. 2d 655, 660 (1955), distinguishes this case on the ground that the vessel involved was a public, not a merchant vessel. But this Court's decision rests upon the terms of the Tucker Act, not upon any such supposed distinction. Further, the Court of Appeals for the Second Circuit, in assuming a different result were the vessel a merchant rather than a public vessel, overlooks the complementary purposes of the Public Vessels Act (43 Stat. 1112 *et seq.*, 46 U.S.C. § 781 *et seq.*) and the Suits in Admiralty Act (46 U.S.C. § 741 *et seq.*). Cf. *Calmar Steamship Corp.* v. *United States*, 345 U.S. at 455.

[10] Long ago Mr. Justice Story pointed out that the same case might be one of either admiralty or common law jurisdiction. He said:

> "The reasonable interpretation would seem to be that it [the Constitution] conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature and extent and modifications in which it existed in the jurisprudence of the common law. When the jurisdiction was exclusive, it remained so; when it was concurrent, it remained so. Hence the States could have no right to create

no reason why the petitioner should not be entitled to a procedural remedy under either act.

2. The main purpose of both the Tucker Act and the Suits in Admiralty Act was to waive, not to assert, Governmental immunity. In the expanding conception of public morality, Congress, as well as the courts, has recognized that:

> "There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it." *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326, 329-330 (8th Cir. 1905).

The wrong is as great when the denial rests on procedural considerations which are unrelated either to the purpose of Congress or the language it used in waiving Governmental immunity to suit as when the denial rests on antiquated theories of sovereign immunity.

The present trend of Congressional policy is to permit the assertion against the sovereign of the same or nearly the same rights that can be asserted against individuals. This is particularly true in cases where, as in this one, the controversy arises out of commercial

---

courts of admiralty as such, or to confer on their own courts the cognizance of such cases as were exclusively cognizable in admiralty courts. But the States might well retain and exercise the jurisdiction in cases of which the cognizance was formerly concurrent in the courts of common law. The latter class of cases can be no more deemed cases of admiralty and martime jurisdiction than cases of common law." 3 STORY COM. CONST. (1833) § 1666, note (5th ed., 1891), cited with approval in *Taylor* v. *Carryl,* 20 How. 583.

Cf. *Dooley* v. *United States,* 182 U.S. 222, 228; *Keifer & Keifer* v. *Reconstruction Finance Corp.,* 306 U.S. 381, 395.

activities in which the sovereign engages. Cf. *National City Bank* v. *Republic of China*, 348 U.S. 356, 360. This Court has recognized the trend of Congressional policy by giving broad scope to waivers of sovereign immunity and by refusing to impute to Congress a failure of purpose in particular cases or a capricious desire to take away the rights it purports to bestow because of irrelevant procedural factors which are largely the results of historical accidents. Cf. *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 394; *Calmar Steamship Corp.* v. *United States*, 345 U.S. 446.

The right of petitioner to a choice of procedural remedies, were the defendant a private party, could not be questioned. 28 U.S.C. § 1333. Cf. *United States* v. *Atlantic Mutual Insurance Co.*, 298 U.S. at 489.

There is no reason to suppose that Congress, in waiving immunty to suit, intended to exclude a similar choice of procedural remedies in suits against the Government. Cf. *United States* v. *Atlantic Mutual Insurance Co.*, 298 U.S. 483. A Congressional intention to make the assertion of rights under the Tucker Act conditional upon the lack of rights under the Suits in Admiralty Act cannot fairly be inferred from the language or purpose of either Act. The court below, by interposing such a condition, defeats the Congressional purpose by subordinating its implementation to the solution of theoretic jurisdictional dilemmas which can be resolved with certainty only after judicial decision on a case by case basis.

3. The decision of the court below will lead to a mass of profitless litigation. The *per curiam decision* of this Court in *Sword Line* does not in itself define the

limits of admiralty jurisdiction or the areas in which such jurisdiction is exclusive in suits against the Government.

Respondent urged, and the court below agreed, that the jurisdiction of the Suits in Admiralty Act is exclusive in all cases in which a libel can be filed under that act. Respondent, in support of its successful motion in the court below to dismiss this case for lack of jurisdiction, also argued that admiralty had jurisdiction over all claims arising out of maritime transactions. Respondent said:

> "As long ago as 1796, the Supreme Court in *United States* v. *La Vengeance,* 3 Dall. 297, settled and has ever since followed without exception the rule that the test of admiralty jurisdiction of causes of action founded upon a statute is whether the facts constitute 'entirely a water transaction' as the Chief Justice there said (3 Dall. at 300) or, as the Second Circuit put it in *Sword* (230 F. 2d at 77), 'upon the inherent maritime character of the underlying transaction.'" Defendant's Memorandum in support of Suggestions of Lack of Jurisdiction and Motion to Reconsider and Dismiss, dated June 28, 1956. (R. 543.)

And the Court of Appeals in *Sword Line* certainly based its decision on the maritime nature of the underlying transaction. Chief Judge Clark explained:

> "We think it sounder, and more in accordance with the nature of admiralty, to rest upon the inherent maritime character of the underlying transaction, rather than upon an attempt to force this claim into the mold of a breach of contract." 230 F. 2d at 77.

The coupling by the court below of the restrictive interpretation of the *Johnson* case with this broad

view of admiralty jurisdiction unsettles the jurisdictional basis for several classes of claims over which this Court has approved, and the Court of Claims and the district courts have assumed, jurisdiction under the Tucker Act. Those are cases like this one where the Tucker Act provides an alternate jurisdictional basis for claims arising out of maritime transactions.

Examples of such cases are:

(a) Suits for the return of illegal exactions by Government officials in connection with exportation and importation of goods. *Dooley* v. *United States,* 182 U.S. 222, approved jurisdiction under the Tucker Act over a claim for the return of customs duties unlawfully exacted on the importation of cargo. *United States* v. *New York and Cuba Mail Steamship Co.,* 200 U.S. 488, approved jurisdiction over a claim for the return of a tax unlawfully exacted on manifests of cargo bound for foreign ports. *United States* v. *Hvoslef,* 237 U.S. 1, approved jurisdiction under the Tucker Act over claims for the return of taxes unlawfully exacted on ocean charter parties.

In the *Dooley* case this Court said:

". . . we think the case is one within the first class of cases specified in the Tucker act, of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the court of claims, under the Tucker act, has been repeatedly sustained." 182 U.S. at 228.

Exportation and importation are plainly maritime transactions. The phrase of Chief Justice

Marshall in the *United States* v. *La Vengeance*, 3 Dall. 297, 301, with respect to a "water transaction" which was quoted in part by respondent in its memorandum of June 28 in support of its motion to dismiss this case for lack of jurisdiction (R. 543), and which was cited with approval by the Court of Appeals in *Sword Line* v. *United States*, 230 F. 2d. at 77, footnote 1, reads in its entirety:

"exportation is entirely a water transaction."

To which Judge Benedict added, in *The Missouri*, 17 Fed. Cas. No. 9,652, at 482 (D.C.E.D. N.Y. 1869) that importation of cargo "is as clearly a 'water transaction'—to use the words of Chief Justice Marshall—as the exportation of cargo. . . ."

(b) In *Alaska Steamship Co.* v. *United States*, 290 U.S. 256, this Court sanctioned jurisdiction under the Tucker Act of a suit for compensation for the water transportation to the continental United States of shipwrecked seamen. A transaction more plainly maritime can hardly be imagined.

(c) In *United States* v. *Atlantic Mutual Insurance Co.*, 298 U.S. 483, this Court, although it recognized that the "law of general average is an ancient feature of the maritime law," sustained the jurisdiction of the Court of Claims over a claim for general average contribution based upon the jettisoning of cargo on an army transport.

(d) The Court of Claims and the district courts have assumed jurisdiction under the Tucker

Act over claims for the return of payments unlawfully exacted as a condition precedent to permitting a change in the registry of a vessel, *Clapp* v. *United States,* 127 C. Cls. 505 (1954), *cert. denied,* 348 U.S. 834; over claims for the return of payments unlawfully exacted for the entrance and clearance of vessels, *Carriso, Inc.* v. *United States,* 106 F. 2d 707 (9th Cir. 1939), (see also *Richfield Oil Corp.* v. *United States,* 207 F. 2d 864 (9th Cir. 1953)); over suits to enforce agreements compromising claims arising out of a charter party, *Compania Ithaca de Vapores, S. A.* v. *United States,* 129 C. Cls. 745 (1954); and over suits to enforce an agreement contained in a charter party to pay brokerage commissions, *D. C. Andrews & Co.* v. *United States,* 129 C. Cls. 574 (1954).

The nature of the underlying transaction in each of these cases is as plainly maritime as that of the underlying transaction in this case. On the basis of *Sword Line,* therefore, all of them may be cognizable in the district court under the Suits in Admiralty Act; on the basis of the particular decisions cited above, they are cognizable in the Court of Claims under the Tucker Act. Because of their nature, the claims are clearly encompassed within the terms and policy of both jurisdictional statutes, and Congress plainly gave the injured party a choice of procedural remedies. The decision of the court below has rejected such a choice. It has interposed the condition, unrelated to the language of the statutes or their purposes, that jurisdiction under the one statute depends upon the lack of jurisdiction under the other. This subordinates the basic purpose of both—the granting of a

right of action in these cases—to the skill or good fortune of claimant's counsel in choosing between the abstract attractions of jurisdictional theories unnecessarily made competitive. This will require profitless litigation on a case by case basis to determine the correctness of the choice.[11]

---

[11] The difficulty of solving the jurisdictional dilemma in advance of decision in a particular case is illustrated by the state of the authorities at the time this suit was commenced. The following cases pointed toward jurisdiction over this claim under the Tucker Act:

> *United States* v. *Atlantic Mutual Insurance Co.*, 298 U.S. 483; *Alaska Steamship Co.* v. *United States*, 290 U.S. 256; *Dooley* v. *United States*, 182 U.S. 222; *United States* v. *New York & Cuba Mail Steamship Co.*, 200 U.S. 488; *United States* v. *Hvoslef*, 237 U.S. 1; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28; *Christie-Street Commission Co.* v. *United States*, 136 Fed. 326 (8th Cir. 1905); *Carriso, Inc* v. *United States*, 106 F. 2d 707 (9th Cir. 1939); *Southeastern Oil Florida, Inc.* v. *United States*, 127 C. Cls. 409 (1953), *cert. denied*, 348 U.S. 834; *Clapp* v. *United States*, 127 C. Cls. 505 (1954), *cert. denied*, 348 U.S. 834; *Pan American World Airways, Inc.* v. *United States*, 129 C. Cls. 53 (1954). *D. C. Andrews & Co.* v. *United States*, 129 C. Cls. 574 (1954); *Compania Ithaca de Vapores, S. A.* v. *United States*, 129 C. Cls. 745 (1954).

The following cases pointed toward a lack of jurisdiction under the Suits in Admiralty Act in this case:

> *United Transp. & L. Co.* v. *N. Y. & Baltimore T. Line*, 185 Fed. 386 (2d Cir. 1911); *Home Ins. Co.* v. *Merchants' Transp. Co.*, 16 F. 2d 372 (9th Cir. 1926); *Silva* v. *Bankers Commercial Corp.*, 163 F. 2d 602 (2d Cir. 1947); *Commercial Trust Co.* v. *United States Shipping Bd. E. F. Corp.*, 48 F. 2d 113 (2d Cir. 1931); *Prince Line Ltd.* v. *American Paper Exports, Inc.*, 55 F. 2d 1053 (2d Cir. 1932); *Israel* v. *Moore & McCormack Co.*, 295 Fed. 919 (S.D.N.Y. 1920); *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864 (9th Cir. 1953);

"As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere." *Davis* v. *Department of Labor*, 317 U.S. 249, 254.[12]

Reliance Lumber Co. v. *Rothschild*, 127 Fed. 745 (E.D. Pa. 1904).

The following cases pointed toward jurisdiction under the Suits in Admiralty Act in this case:

United States v. *La Vengeance*, 3 Dall. 297; *The Hope*, 10 Pet. 108; *The Harriman*, 9 Wall. 161; *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U.S. 377; *Globe & Rutgers Ins. Co.* v. *United States*, 105 F. 2d 160 (2d Cir. 1939), *cert. denied*, 308 U.S. 611.

[12] This probability is high in cases like this one where the choice is between jurisdiction in the district court under the Suits in Admiralty Act and jurisdiction in the Court of Claims under the Tucker Act. Plaintiff cannot protect himself as the plaintiff did in *Matson Navigation Co.* v. *United States*, 284 U.S. 352, by suing simultaneously in the Court of Claims and in the district court. 28 U.S.C. § 1500. See *Calmar Steamship Co.* v. *United States*, 345 U.S. 446, at 455 n. 7. If in a doubtful case he sues first in the Court of Claims, it is extremely likely that the two-year statute of limitations under the Suits in Admiralty Act will have run before the jurisdictional question has been finally determined. If he decides to begin suit in the district court under the Suits in Admiralty Act, the venue provisions of that act will in most cases require suit to be brought in the Southern District of New York because that is the district where the greater number of steamship companies "reside or have their principal place of business in the United States." 46 U.S.C. § 742. The median interval in that district from filing to disposition of a civil, nonjury case is over 44 months, and if dilatory pleadings are interposed, as they frequently are when jurisdictional questions are involved, the interval may be much longer. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED

Forty-six cases similar to this one were pending in the court below when it dismissed this case for lack of jurisdiction. The Congressional intention to waive sovereign immunity in these cases is itself beyond question. The claims admittedly are founded upon Acts of Congress. The Tucker Act vests in the Court of Claims jurisdiction to render judgment upon any claim against the United States founded upon "any Act of Congress." The law upon which the validity of these claims depends was developed in the Court of Claims,[13] and at the time the suits were filed, a line of authorities held that there was no jurisdiction in ad-

---

STATES COURTS at p. 178 (1955). Not a single one of the 22 cases filed in the district courts on this type of claim is at issue, although some of those cases were filed more than two years ago.

[13] The Solicitor General recognized the identity of the principles involved in the case at bar with those involved in *Southeastern Oil Florida, Inc.* v. *United States*, 127 C. Cls. 409 (1953), *cert. denied*, 348 U.S. 834. In his petition for certiorari in *Southeastern Oil Florida, Inc.*, the Solicitor General said:

> ". . . the validity of contract terms adopting a challenged view of statutory pricing provisions is involved in a large number of charters under Section 5 of the Ship Sales Act. Section 5 provided that the Commission might charter vessels to private applicants under bareboat charters providing for payment to the government as charter hire of one-half of all profits in excess of ten percent. The Commission entered into charters providing for recapture of profits on a sliding scale ranging up to 90 percent of profits in excess of ten percent. If, as seems likely, these rates are held by the court below, on the basis of the present decision, to be recoverable by the charterers as violating the terms of the Statute, the Maritime Administration estimates that the government will be open to potential claims of $40,000,000." (At pp. 13-14, n. 10.)

See also *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28; *Dooley* v. *United States*, 182 U.S. 222.

miralty over such claims. *Archawski* v. *Hanioti,* 350 U.S. at 534. All of these cases, although timely brought in the court below, may now be held to be barred in the district court under the two-year statute of limitations of the Suits in Admiralty Act.[14] Under these circumstances, to deny to petitioner a right to sue in the Court of Claims because he might, in anticipation of the overruling of an existing line of authorities, have brought suit in the district court, is to deny to him the right to sue at all. Such a result defeats the Congressional purpose by giving controlling weight to irrelevant procedural factors, and "rests on the inadmissable premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye." *United States* v. *Emery, Bird, Thayer Realty Co.,* 237 U.S. at 32.

CONCLUSION

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

ARTHUR M. BECKER,
839 17th Street, N. W.,
Washington 6, D. C.,
Counsel for Petitioner.

Of Counsel:

BECKER & MAGUIRE,
Washington, D. C.

August 28, 1956.

---

[14] See *American Eastern Corp.* v. *United States,* 133 F. Supp. 11 (S.D.N.Y. 1955), *aff'd,* 231 F. 2d 664 (2d Cir. 1956); *A. H. Bull Steamship Co.* v. *United States,* 141 F. Supp 58 (S.D.N.Y. 1956).

APPENDIX

APPENDIX

APPENDIX

Appendix A: Statutes Involved

28 U.S.C. § 1491

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * *

Act of March 9, 1920

41 Stat. 525, 46 U.S.C. §§ 741, 742

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

Sec. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a mer-

chant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. . . .

MERCHANT SHIP SALES ACT OF 1946

60 Stat. 43, 50 U.S.C. App. § 1738

CHARTER OF WAR-BUILT VESSELS TO CITIZENS

SEC. 5. (a) Any citizen of the United States and, until July 4, 1946, any citizen of the Commonwealth of the Philippines, may make application to the Commission to charter a war-built dry-cargo vessel, under the jurisdiction and control of the Commission, for bare-boat use. The Commission may, in its discretion, either reject or approve the application, but shall not so approve unless in its opinion the chartering of such vessel to the applicant would be consistent with the policies of this Act. No vessel shall be chartered under this section until sixty days after publication of the applicable prewar domestic cost in the Federal Register under subsection 3 (c) of this Act.

(b) The charter hire for any vessel chartered under the provisions of this section shall be fixed by the Commission at such rate as the Commission determines to be consistent with the policies of this Act, but, except upon the affirmative vote of not less than four members of the Commission, such rate shall not be less than 15 per centum per annum of the statutory sales price (computed as of the date of charter). Except in the case of vessels having passenger accommodations for not less than eighty passengers, rates of charter hire fixed by the Commission on any war-built vessel which differ from the rate specified in this subsection shall not be less than the prevailing world market charter rate for

similar vessels for similar use as determined by the Commission.

(c) The provisions of sections 708, 709, 710, 712, and 713, of the Merchant Marine Act, 1936, as amended, shall be applicable to charters made under this section.

(d) Where an operator is engaged both in the foreign trade and in the domestic trade (coastwise or intercoastal), additional charter hire determined with reference to voyage profits of the chartered vessels, under regulations promulgated by the Maritime Commission, shall be computed, accounted for, and paid separately on such foreign trade and shall be computed, accounted for, and paid separately on such domestic trade, covering all voyages commencing subsequent to June 30, 1947.[1]

MERCHANT MARINE ACT, 1936

49 Stat. 2010, 46 U.S.C. § 1199

SEC. 709. (a) Every charter made by the Commission pursuant to the provisions of this title shall provide that whenever, at the end of any calendar year subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, That the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

---

[1] Subsection (d) was added by the Act of June 28, 1947, 61 Stat. 190.

(b) Every charter shall contain a definition of the terms "net voyage profit" and "fair and reasonable overhead expenses", and "capital necessarily employed", as said terms are used in subsection (a) of this section, setting forth the formula for determining such profit and overhead expense and capital necessarily employed, which definitions shall have been previously approved by the Commission and published in the advertisement for bids for such charter.

Appendix B: Order and Opinion Below

IN THE UNITED STATES COURT OF CLAIMS

No. 98-55

(Decided July 12, 1956)

SMITH-JOHNSON STEAMSHIP CORP.

v.

THE UNITED STATES

Mr. Arthur M. Becker for plaintiff. *Messrs. Melvin Spaeth, Gerald B. Greenwald* and *Becker & Maguire* were on the brief.

Mr. Leavenworth Colby, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for defendant.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION

PER CURIAM: In our opinion in this case rendered March 6, 1956, which was before us at that time on plaintiff's motion to strike defendant's special defense, we granted that motion, holding that plaintiff's petition was based on a statute and did not arise out of the maritime contract between the United States and plaintiff. Hence, we said

the courts of admiralty did not have jurisdiction of such a case and that this court [illegible]

The Second Circuit Court of Appeals had held in *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, that the suit was on the contract, and since the contract was for the charter of a ship, it was maritime in nature, and, therefore, the admiralty courts had jurisdiction. Certiorari was granted in that case, and the Second Circuit was affirmed by the Supreme Court in a *per curiam* opinion, which reads:

> *Per curiam:* Certiorari is granted limited to the question whether admiralty had jurisdiction over the controversy stated in the libel and the judgment is affirmed. The libel, though dependent on a statute, alleges unjust enrichment from a maritime contract. *Archawski* v. *Hanioti*, 350 U.S. 532. Affirmed.

Since it is now settled that such causes of action are maritime causes of action and that, consequently, courts of admiralty have jurisdiction of them, this court does not have jurisdiction, because it is settled that the Suits in Admiralty Act, vesting jurisdiction in the district courts, "furnishes the exclusive remedy in admiralty against the United States and such corporations on maritime causes of action arising out of the possession and operation of merchant vessels." *Johnson* v. *Fleet Corp.*, 280 U.S. 320.

Plaintiff, Smith-Johnson Steamship Corporation, in its memorandum brief filed pursuant to the Court's order of June 14, 1956, says this case was overruled by the Supreme Court in *Brady* v. *Roosevelt Steamship Co.*, 317 U.S. 575, 578.

In the opinion in *Johnson* v. *Fleet Corporation, supra,* the court dealt with four cases, of which *United States Shipping Board Emergency Fleet Corporation* v. *Lustgarten* was one. In the *Lustgarten* case, an action at law for damages for personal injuries was brought in the United States District Court against the Fleet Corporation and the Navigation

Company. The Navigation Company was a private corporation operating a vessel owned by the United States as the agent of the United States. Defendant's answer alleged that "plaintiff's remedy is provided exclusively by the Suits in Admiralty Act," and, since his action was brought on the law side of the court, rather than the admiralty side, the suit should be dismissed.

The Supreme Court held that courts of admiralty had exclusive jurisdiction and, hence, it remanded the case with directions to the District Court to dismiss it.

In *Brady* v. *Roosevelt Steamship Company, supra,* the Supreme Court said it was erroneous to have dismissed the case as against the private company operating the ship as agent for the United States; but it reaffirmed its former action in dismissing it as to the *Fleet Corporation.* It said:

> There is ample support for the holding in the *Johnson* case that section 2 of the Suits in Admiralty Act was intended to provide the only available remedy against the United States or its wholly owned corporations for enforcement of maritime causes of action covered by the Act. * * *

Therefore, instead of impairing the authority of *Johnson* v. *Fleet Corporation, supra,* so far as the question now before us is concerned, *Brady* v. *Roosevelt Steamship Co., supra,* upholds it and reaffirms the exclusive jurisdiction of courts of admiralty "for the enforcement of maritime causes of action covered by the Act."

In *Sword Line, Inc.* v. *United States, supra,* the Supreme Court has said this action was a maritime one and was covered by the Act. Hence, we have no alternative other than to deny plaintiff's motion for summary judgment and to grant defendant's motion to dismiss plaintiff's petition for lack of jurisdiction.

It is so ordered.

Appendix C: Order and Opinion of Court Below Dated March 6, 1956

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 6, 1956)

No. 98-55

SMITH-JOHNSON STEAMSHIP CORP.,

v.

THE UNITED STATES

No. 262-55

PACIFIC FAR EAST LINE, INC.,

v.

THE UNITED STATES

No. 314-55

BLACK DIAMOND STEAMSHIP CORP.,

v.

THE UNITED STATES

Mr. Arthur M. Becker for plaintiff in case No. 98-55; *Messrs. Melvin Spaeth, Gerald B. Greenwald,* and *Becker & Maguire* were on the briefs. *Mr. J. Franklin Fort* for plaintiff in case No. 262-55; *Messrs. Radner, Zito, Kominers & Fort,* and *Israel Convisser* were on the briefs. *Mr. George F. Galland* for plaintiff in case No. 314-55; *Messrs. William J. Lippman, Robert N. Kharasch,* and *Galland & Kharasch* were on the briefs.

Mr. Leavenworth Colby, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for defendant.

ON PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S SPECIAL DEFENSE IN CASE NO. 98-55, AND ON DEFENDANT'S MOTIONS TO DISMISS IN CASES NOS. 262-55 AND 314-55.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff alleges in the *Smith-Johnson Steamship Corporation* case that the defendant exacted from it for the hire of certain vessels more than was authorized by the Merchant Ship Sales Act of 1946 (60 Stat. 41), 50 U. S. C. App. 1735, et seq., and the Merchant Marine Act of 1936 (49 Stat. 1985), 46 U. S. C. 1101, et seq. It sues for the excess. Defendant in its answer sets up the special defense that this court lacks jurisdiction of the subject matter, because, it says, plaintiff's cause of action is on the contract for the hire of the vessels and is, therefore, maritime in nature, of which actions the admiralty courts have exclusive jurisdiction. Plaintiff says its action is on the statute and it moves to strike defendant's special defense.

The Merchant Ship Sales Act of 1946 provided for the charter of war-built vessels. Section 5 (b) authorized the United States Maritime Commission to fix the charter hire for vessels at such rates as the Commission should determine to be consistent with the policy of the Act. Plaintiff says that, in fixing the charter hire for the vessels chartered to it, the Commission went contrary to the policy of the Act in that it exacted from it a stated hire and in addition percentages of its profits on the voyages of the vessels in excess of the percentages authorized by the Act.

Section 5 (c) of the Act incorporated section 709 (a) of the Merchant Marine Act of 1936 (49 Stat. 1985, 2010) which provided:

> Every charter made by the Commission * * * shall provide that whenever, at the end of any calendar year

subsequent to the execution of such charter, the cumulative net voyage profits (after payment of the charter hire reserved in the charter and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the chartered vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of such chartered vessels, the charterer shall pay over to the Commission, as additional charter hire, one-half of such cumulative net voyage profit in excess of 10 per centum per annum: *Provided*, that the cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in subsequent years.

The charter agreement tendered plaintiff by the Maritime Commission provided for a basic charter hire and also for additional charter hire as follows:

Clause 13. *Additional Charter Hire.* If at the end of the calendar year 1946, or any subsequent calendar year or at the termination of this Agreement, the cumulative net voyage profit (after the payment of the basic charter hire hereinabove specified and payment of the charterer's fair and reasonable overhead expenses applicable to operation of the vessels) shall exceed 10 per centum per annum on the charterer's capital necessarily employed in the business of the vessels (all as hereinafter defined), the charterer shall pay over to the owner at Washington, D. C., within 30 days after the end of such year or other period, as additional charter hire for such year or other period, an amount equal to the percentages of such cumulative net voyage profit in excess of 10 per centum per annum on such capital computed in accordance with the following table (but such cumulative net profit so accounted for shall not be included in any calculation of cumulative net profit in any subsequent year or period):

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) not in excess of $100 per day—50%.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $100 per day but not in excess of $300 per day—75% on such excess over $100 per day.

Cumulative net voyage profit (in excess of 10% per annum on capital necessarily employed) in excess of $300 per day—90% on such excess over $300 per day.

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 "WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT chartered) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.

Plaintiff says this charter agreement exacted a percentage of its profits in excess of that authorized by law. Nevertheless, the charter agreement was executed and eight vessels were delivered to plaintiff. While the charter agreement was in effect plaintiff made preliminary payments of additional charter hire to defendant, pursuant to clause 13 of the agreement, quoted above, totalling the sum of $613,395.32. By final audit completed on Feburary 4, 1955, defendant determined that, at the time of the audit, a total of $616,063.04 had accrued to defendant as additional char-

ter hire under the charter agreement, which was paid on demand. Plaintiff seeks to recover $231,773.81 of the amount paid defendant as additional charter hire, on the ground that the contract exacted this much more than was authorized by law.

The issue presented is whether plaintiff's claim is on the contract, and, therefore, maritime in nature, of which the district courts have exclusive jurisdiction, or is a claim based on the statute, of which this court is given jurisdiction by section 1491 of Title 28 U.S.C.

Defendant says the action is maritime under both the Public Vessels Act and the Suits in Admiralty Act. The Public Vessels Act is not applicable because the vessels involved herein are not public vessels; only the Suits in Admiralty Act is pertinent. This Act confers exclusive jurisdiction on the district courts only in situations where, if the vessels were privately owned, a proceeding in admiralty could be maintained. *D. C. Andrews & Co.* v. *United States*, 129 C. Cls. 574. If plaintiff were basing its claim on the charter agreement, the action would clearly be maritime in nature and maintainable in admiralty; but plaintiff does not base its claim on the charter agreement, but on the ground that the agreement exacted more than could lawfully be exacted. The contract has been performed according to its terms. No cause of action on the contract exists. Plaintiff's claim can only be grounded on the fact that the contract required more than the law authorized. Hence, its action is based on the statute, and this court, therefore, has jurisdiction.

Defendant relies upon *Krauss Bros. Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, but in this case, plaintiff's claim was based on the contract, and not on the ground that the contract had exacted more than the law allowed. Plaintiff alleged that it had paid more for the carriage of freight than was due under the contract and sought to recover the amount of the overpayment. Admiralty had jurisdiction because the suit was on a maritime contract. The case is not in point on the question before us.

In *Archawski* v. *Hanioti*, 223 F. 2d 406, the Court of Appeals for the Second Circuit said that an action by prospective passengers to recover money paid for passage on a vessel that never sailed was a common law action of *indebitatus assumpsit*, of which the admiralty courts had no jurisdiction. The Supreme Court granted certiorari, and it may be it will hold that the action was for a breach of a maritime contract, of which the admiralty courts have jurisdiction; but, even so, such a decision could not affect the decision of this case, since we think this is a suit based not on a contract, either maritime or at common law, but on a statute.

The Second Circuit, in an opinion by a pre-eminent jurist, decided *Sword Line, Inc.* v. *United States*, 228 F. 2d 344, in which it took a view contrary to what we have expressed. It said in effect that the parties are presumed to have agreed on a hire for the vessels no greater than the law allowed and, hence, that the suit for excessive exaction was a suit on the contract, of which the courts of admiralty have jurisdiction. But no such presumption can be indulged in the case at bar, because it is contrary to the facts. The parties in fact did agree on a hire greater that the law allowed—taking the allegations of the petition to be true.

If the Government is not entitled to retain the excess, it is not because plaintiff did not agree to pay it, but because the statute did not authorize the exaction of so much. If plaintiff is entitled to recover, it is because its rights under the statute have been violated, not its rights under the contract.

For the reasons stated, we conclude that the plaintiff's cause of action is non-maritime in nature, and is one which could not be maintained in a court of admiralty. Accordingly, the claim falls within the jurisdiction of this court, and plaintiff's motion to strike defendant's special defense of want of jurisdiction is granted.

Defendant, in cases Nos. 262-55 and 314-55, has moved the court to dismiss for lack of jurisdiction. Relative to the

question of jurisdiction, the causes of action asserted in the petitions of the respective plaintiffs in these cases are identical to the cause of action asserted in *Smith-Johnson Steamship Corporation* v. *United States*, No. 98-55. For reasons stated above, we hold that this court has jurisdiction over the subject matter of these causes of action. Therefore, defendant's motions to dismiss for lack of jurisdiction must be denied.

It is so ordered.

LARAMORE, *Judge;* MADDEN *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.